**Docket Nos:** 07-0539
and 07-0540
**Bench Date**:2/06/08
**Deadline:** 2/15/08

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**TO:** The Commission

**FROM:** Claudia E. Sainsot and Ethan Kimbrel
Administrative Law Judge

**DATE:** February 3, 2008

**SUBJECT:** The Commonwealth Edison Company, and the Ameren Illinois Companies

Petitions seeking Approval of Energy Efficiency and Demand-Response Plans.

**Recommendation:** Enter the Post-Exceptions Proposed Orders.

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This Memo discusses the Briefs on Exception filed in the above-captioned dockets filed on Friday, February 1, 2008, and any resulting changes to the Administrative Law Judge's Proposed Orders (the "ALJPOs") in these two dockets as a result of those Briefs on Exceptions.

In general, many of the arguments raised in the Briefs on Exception suggested minor language changes, or, suggested adding language clarifying what was already in the ALJPOs. Most of this language was added or changed. Additionally, minor typographical and like errors were changed. The changes to the ALJPOs were made in "track changes" mode. If the Commission finds those changes to be acceptable, it merely has to "accept" those changes in Word. With regard to the substantive arguments that the many parties made in their Briefs on Exception, many of those arguments simply "rehash" that which was already argued. The new arguments presented in the Briefs on Exceptions are discussed below.

Only two substantive changes were made to the ultimate conclusions in the ALJPOs as a result of arguments made in Briefs on Exception. The first was in the Order in the Ameren Illinois Companies' ("Ameren's") docket, 07-0539. Because Ameren stated in its posttrial brief that it presented no evidence on the issue of "banking" excess energy savings, the ALJPO concluded, essentially, that Ameren had waived its right to present this argument. The Post-Exceptions Proposed Order concludes that Ameren and the Illinois Department of Commerce and Economic Opportunity, ("DCEO") if it chooses, should be allowed to "bank" excess energy savings

and cost overruns, in the same manner, in which, the Commonwealth Edison Company ("ComEd") was allowed. Both Ameren and DCEO pointed out that some evidence was presented on this issue in the Ameren docket. Also, both Ameren and DCEO presented compelling arguments for uniformity and consistency from this Commission regarding the two utilities. At a minimum, the lack of consistency between allowing ComEd to "bank" but not allowing Ameren to "bank" creates confusion, unnecessarily, for DCEO, as DCEO is required by the new statute, Section 12-103 of the Public Utilities Act, to administer 25% of both of the two utilities' programs. (220 ILCS 5/12-103(e)).

The second substantive change was made in both the ComEd and Ameren ALJPOs. The ComEd ALJPO imposed certain restrictions upon the recovery of cost overruns. ComEd and Staff point out that the spending limits in the statute are used to determine whether the estimated average increase in amounts to be paid exceed the limit. In Staff's opinion, Subsection (d) of the statute, which concerns the cost recovery limits, does not operate as a strict cost recovery limitation. (ComEd Brief on Exceptions at 23; *See also,* Staff Brief on Exceptions at 8). Thus, in essence, ComEd and Staff contend that restrictions in the ComEd ALJPO upon recovery of cost overruns were erroneously imposed.

Upon further review of the statute, it appears that ComEd and Staff are correct. (*See,* 220 ILCS 5/12-103(d)). The ALJPOs in ComEd's and Ameren's dockets were modified to impose no limit or restriction upon the recovery of prudently incurred cost overruns.

**Other Arguments Regarding "Banking" Energy Savings**

The ALJPO in the ComEd docket, 07-0540, allowed ComEd to "bank" excess energy savings, but, only up to and including 10% of the energy savings goals, as 10% was determined to be *de minimus*. Staff argues that this Commission should not allow the utilities to "bank" energy savings. (Staff Brief on Exceptions at 9-10). Staff seems to acknowledge that generally, a *de minimus* violation of a law is considered to be too trifling to matter. Given that tens of millions of dollars will be spent on energy efficiency and demand response, Staff suggests that 10% of the energy savings goals is not *de minimus*. (*Id.*).

Staff is correct that a *de minimus* amount is a mere trifle. Admittedly, what is a mere trifle can be subjective. Therefore, if this Commission finds that 10% of the energy savings goals is not *de minimus*, it can reduce this amount.

**The Advisory Committee**

With the exception of Staff, all parties agreed that some sort of advisory committee to the utilities would be useful. The ALJPOs provided for the creation of advisory committees for the two utilities. The Post-Exceptions Proposed Orders responded to language suggested by various entities contending, essentially, that it would be useful to set forth what the advisory committees should be doing. These two

Orders set forth various topics for non-binding recommendations to be made by the advisory committees and they require the committees to prepare a report for this Commission to review.

**Updating the Spending Limits**

Both Ameren and ComEd contest the conclusions in the ALJPOs requiring them to update their spending limits annually. (Ameren Brief on Exceptions at 15; ComEd Brief on Exceptions at 12). ComEd contends that Section 12-103(f) requires a utility to present the spending screens for all three years for Commission approval as part of its Plan. (220 ILCS 5/12-103(f)). This statutory language would be meaningless, ComEd reasons, if ComEd were to update its spending screens annually.

However, as was discussed in the ALJPOs in both dockets, the statute requires utilities to make calculations in order to determine the actual spending screens, based upon percentages of the previous year's figures. (*See, e.g.,* 220 ILCS 5/12-103(d)(2), which requires the 2009 spending screen to be the greater of an additional 0.5 % of the amount paid per kilowatt hour by customers "during the year ending May 31, 2008 or 1% of the amount paid per kilowatthour . . . during the year ending May 31, 2007."). Moreover, this argument is not logical. Requiring the utilities to update their spending screens annually does not nullify the statutory language requiring Commission approval of an initial three-year determination. It just means that the General Assembly requires the utilities to gain approval of an initial estimate for all three years, *and,* it requires the utilities to recalculate their spending limits annually. This contention does not aid ComEd.

Ameren presented no law on this issue, but, it cited testimony that stated, in essence, that updating spending screens on a tri-annual basis provides greater stability, as, updating the spending screens annually could result in significantly higher or lower spending limits. (Ameren Brief on Exceptions at 16). This is undoubtedly true, but, the statute requires utilities to update their spending screens annually. Ameren provides no explanation as to how this Commission can ignore that which is required by statute.

Ameren also sought to add language stating that the only annual calculation that would be required of it would be the spending screen, but not a recalculation of future years' usage and cost estimates. (*Id.* at 17). The Post-Exceptions Proposed Orders do not add this language, as, obviously, if the amount of money a utility has to spend during a year can change, as a result of updating the spending screens annually, so can usage or cost issues, depending upon the circumstance.

**Hiring and Firing the Evaluator**

Both Ameren and ComEd contest the conclusion reached in the ALJPOs finding that the Commission, and not the utilities, must have the power to hire and fire the independent evaluator that is required by statute. (ComEd Brief on Exceptions at 31-33; Ameren Brief on Exceptions at 3-4). They both assert that the statute requires the

utilities to perform this function. Both utilities cite the statute, which provides that utilities shall . . . "[p]rovide for an annual independent evaluation of the performance of the cost-effectiveness of the utility's portfolio of measures . . . as well as a full review of the 3-year results . . . "(220 ILCS 5/12-103(f)(7)). The General Assembly's use of the word "provide," they reason, requires the utilities to hire and fire the independent evaluator. (*See, e.g.,* ComEd Brief on Exceptions at 32-33).

However, the plain meaning of the word "provide" means to "obtain" or to "supply". (Webster's New World Dictionary, 8th ed., p. 1172). This statutory language, therefore, determines that the utilities will pay for the independent evaluator; it does not require the utilities to do the hiring and firing regarding the evaluator. Ameren's and ComEd's construction of the statute also ignores the General Assembly's use of the word "independent" in the statutory language cited above. The evaluator cannot be "independent," as Staff pointed out in its posttrial brief, if the control over the hiring and firing of this evaluator is at the discretion of the utilities. Therefore, no changes were made to the ALJPOs pursuant to this argument.

**Commission Review to Determine Compliance with Section 12-103 of the Public Utilities Act**

The statute requires Commission review of the utilities' compliance with energy efficiency standards "after 2 years" and again "after 3 years." (220 ILCS 5/12-103(i) and (j)). Accordingly, the ALJPOs in both the ComEd and Ameren dockets set the dates for commencement of such review as September 1, 2010 and September 1, 2011. No party objected to the dates or to the language concluding that these dates should be set. However, the Illinois Attorney General (the "AG") and the Environmental Law and Policy Center (the "ELPC") both argue that these reviews are necessary but not sufficient. Both entities seek Commission imposition of a review in September of 2009. (*See, e.g.,* AG Brief on Exceptions in docket 07-0539 at 2-3; ELPC Brief on Exceptions in docket 07-0539 at 11).

The ELPC asserts that a review that begins on September 1, 2010 would not conclude until well into 2011, which would be nearly three years after the start of energy efficiency plans. It is important, it continues, to ensure that we are "heading on the right path." The AG acknowledges that the utilities face no penalty for failure to meet the statutory requisites for energy efficiency, but, it points out that the statute nevertheless requires the utilities to comply with the energy efficiency and demand response standards commencing June 1, 2008. (*See, e.g.,* AG Brief on Exception in 07-0539 at 2-3; 220 ILCS 5/12-103(b)(1) and (c)).

However, neither party cited any authority for subjecting the utilities to a review which, they acknowledge, is not required by law. Additionally, presumably, there is a reason that the General Assembly chose not to impose Commission review just after the first year of statutorily-imposed energy efficiency. If the utilities do not have Commission review during the first year, they have greater flexibility to determine what

programs work better than others, and like items. The Post-Exceptions Orders do not impose the one-year review suggested by the AG and the ELPC.

**"Deemed" Values**

ComEd objects to the fact that the table of values for light bulbs to be "deemed" that were attached to the ALJPO were those submitted by DCEO, and not the table submitted by ComEd. (ComEd Brief on Exceptions at 27). It is unclear why ComEd voices this objection, as these values were taken from the same source and they should be, and certainly appear to be, the same. Notably, DCEO's table of "deemed" values was also attached to the ALJPO in the Ameren docket. Ameren did not object to the use of DCEO's "deemed" values. Also, ComEd did not state that anything was missing from the DCEO table, or any other fact that would establish prejudice from use of DCEO's table. Without any facts establishing harm, this Commission should reject this argument.

ComEd also takes issue with the conclusion in the ALJPO declining to deem Net to Gross ratios.[1] (*Id.*). It does not quibble with the ultimate conclusion that these values should not be deemed. Rather, it takes issue with the conclusion that these values must be determined during the first year of the plan's implementation, and used retrospectively, as opposed to prospectively. In support, ComEd cites Section 103(f)(7) of the statute. It also points out that the ALJPO recognized that "deeming" values now adds a level of certainty to, and definition in, the operation of an energy efficiency and demand response plan. (*Id.* at 28).

However, the ALJPO concluded that the evidence presented in support of deeming the Net to Gross ratios was defective for many reasons. These values are the California Public Utility Commission's "default" values, meaning that they are used when there are no real figures available. There was no showing that California adjusts these values prospectively, after real numbers are determined. Also, there was no showing that the California programs have the same elements or measures as those that the utilities plan to offer here. Additionally, California has very different climate than Illinois and there was no showing that information from other Midwestern states with energy efficiency programs could not have been used. ComEd did not dispute any of these findings.

Thus, while "deeming" adds a level of certainty, there is no point to having certainty about numbers that appear to be baseless. For this reason, the ALJPOs in both the ComEd and the Ameren dockets concluded that the Net to Gross ratios must be developed in the first year. In this way, any uncertainty will only concern that first year. The ALJPOs also concluded that the utilities should work closely with their evaluator(s), thus, minimizing any "surprise" in the form of a Net to Gross ratio that is determined in that first year.

[1] Ameren did not take exceptions to the conclusions in the ALJPO in its docket refusing to "deem" Net to Gross ratios. (Ameren Brief on Exceptions at 19).

Additionally, the statutory language ComEd cites also does not aid it. The section of the statute that ComEd cites concerns "adjustment of the measures on a going-forward basis" as a result of annual evaluations. (220 ILCS 5/12-103(f)(7)). This language concerns changing the programs offered by the utilities as a result of annual evaluations, or elements ("measures") in those programs. It does not concern measurement of the effectiveness of programs, which is what a Net to Gross ratio concerns. Therefore, no changes were made to the ALJPOs pursuant to this argument.

**Single-Charge Cost Recovery**

Staff and ComEd take exception to the conclusions in the two ALJPOs modifying the utilities' original proposal to impose a single charge on all rates classes. (ComEd Brief on Exceptions at 16; Staff Briefs on Exceptions, in both dockets, at 2-4). Pursuant to evidence presented by the Illinois Industrial Energy consumers, (the "IIEC") the ALJPOs modified the single charge to a flexible charge, based upon the degree of customer usage of the programs offered by the utilities' plans. This proposal allocated the charge amongst three broad classes, residential, small commercial and industrial, and large commercial and industrial. Ameren had no objection to reallocating the charge in such a manner.

Staff contends that since all Illinoisans will benefit equally from energy efficiency and demand response, the charge to be imposed should be based upon a single, uniform charge to all customers. In support, Staff cites a Washington PUC decision, in which, the Washington PUC found that no cross subsidy occurs when a single charge is imposed upon all persons and entities. (Staff Briefs on Exception, in both dockets, at 4).

ComEd additionally cites Section 9-241 of the Public Utilities Act, which was cited in the ALJPOs, and contends that this statute only prohibits unreasonable differences as to rates or other charges imposed by utilities. (ComEd Brief on Exceptions at 16; 220 ILCS 5/9-241).

However, the ALJPOs concluded that the approach proposed by the IIEC is more in conformance with traditional rate-making principles that are enunciated in the Public Utilities Act. For that proposition, both of the ALJPOs cited Section 9-241. (*See, e.g.,* ALJPO in docket 07-0540 at 38). No conclusion was reached that single-charge cost recovery violated this statute. Therefore, ComEd's argument does not aid it.

Staff's contention, however, cannot be so easily distinguished. There is merit to imposing a single charge, equally, upon all Illinoisans, because we do all benefit from energy efficiency and demand response. Since the IIEC's proposal provides a better match between those who use more energy efficiency and those who should, therefore, pay more for energy efficiency, the proposed language was not added.

**BOMA's Arguments**

At trial in the ComEd docket, the Building Owners and Managers Association of Chicago ("BOMA") sought to reapportion the charge for energy efficiency and demand response amongst 15 different classes of ratepayers. On Exceptions, BOMA supports the methodology of calculating the surcharge in the ComEd ALJPO, (and also just mentioned above) but, it argues, essentially, that the reapportionment should go further, to be broken down to 15 different rate classes. (BOMA Brief on Exceptions at 5-6). BOMA argues that the conclusion in the ALJPO that the utilities would incur additional costs pursuant to BOMA's proposal is not substantiated by the record. In support, BOMA points to testimony cited in the ComEd ALJPO, the testimony of Mr. Brandt, a ComEd witness. Mr. Brandt concluded that there would be additional personnel and system costs associated in tracking and reporting breaking-out costs by class, but he stated no facts in support of this factual conclusion. BOMA contends, essentially, that this factual conclusion should not be considered because there are no facts of record supporting it. (*Id.*).

BOMA is correct in that Mr. Brandt's statement is vague. However, it seems obvious that some work, at least initially, would be involved in the redistribution of a single charge in 15 different ways. Moreover, one reason that the ALJPO in the ComEd docket rejected BOMA's argument was that it was not possible to determine, given the short amount of time allocated by the General Assembly, whether BOMA's reallocation of the charge was accurately proportionate. BOMA does not dispute this finding. Therefore, this argument was not included in the ComEd Post-Exceptions Proposed Order.

**ComEd's "Nature First" Program**

The evidence presented at trial established that ComEd is willing to spend $80 per person for advertising to increase program participation by, approximately, 8,000 customers. The maximum that a "Nature First" program participant can be paid, however, is $40. The evidence also established that ComEd is reluctant to actually use this program because its participants are not paid very much.

The ALJPO found that, given that ComEd is reluctant to actually use this program, $80 per person is disproportionate to what a "Nature First" participant can receive. The ALJPO directed ComEd to reallocate funds in such a manner than will allow ComEd the freedom to use it more often, as is needed, without the fear of having many customers "drop out" of this program. It also encouraged ComEd to use, to the extent practicable, low-cost, or no-cost methods of marketing, such as public service announcements, updating its web site, and press releases.

ComEd takes exception with the conclusion in the ALJPO that the expenditures it plans to make regarding advertising were disproportionate to the amount of money a program recipient could receive. (ComEd Brief on Exceptions at 37-41). ComEd points out that the advertising costs it expects to incur are a projection, and, they are only a

one-time cost. (*Id.* at 37). However, while ComEd compares the $80 per person advertising cost to a $40 figure that a "Nature First" program participant could receive, in fact, $40 is the maximum that a "Nature First" program participant could receive. Since ComEd rarely uses this program, (the program has only been used during six of the twelve years, in which, it has operated and its average use is 1.25 per year) it is doubtful that many participant have ever received $40.

ComEd points out that the Citizens Utility Board ("CUB") articulated that the concerns expressed by Mr. Thomas, CUB's witness, were resolved due to statements made in ComEd's rebuttal testimony. (*Id* at 39). Mr. Thomas, however, sought to require ComEd to "cycle" (turn a participant's air conditioning off) 20 times per year. When testimony established that the program's design only allowed ComEd to "cycle" 10 times per year, it became evident that Mr. Thomas' recommendation was not practicable. It therefore appears that this was the reasoning behind CUB's decision to state that ComEd's rebuttal testimony resolved this issue. ComEd asserts, essentially, that, because CUB did not make an argument regarding this issue, it is not clear what the evidentiary basis is for the conclusion in the ALJPO that ComEd should redesign its "Nature First" program. (*Id.*).

However, CUB's decision not to press an issue has nothing to do with what the evidence established. And the evidence very clearly established that ComEd is reluctant to actually "cycle," or use the program. Indeed, ComEd's own argument supports modifying this program, as it acknowledges that:

> [i]t makes little economic sense to call the program more often, as the maximum additional benefit per customer from calling the program ten times ($1.54 in 2007) would be more than offset by the additional incentive payment needed to persuade customers to remain on the program."

(*Id.* at 41). (Emphasis added). Therefore, even when asking this Commission to reverse the conclusion in the ALJPO that ComEd is reluctant to use this program because its recipients are not paid very much, ComEd has acknowledged that this conclusion is accurate.

ComEd's point that advertising costs are merely a one-time expense, is worth consideration. However, the expenditure of a great deal of money ($80 x approximately 8,000, or, approximately $640,000) on increasing participation is questionable when the evidence established that ComEd is reluctant to use this program.

Moreover, allowing ComEd unfettered use of funds for advertising could set a precedent that could be used, in future years, in a manner that motivates a utility to spend energy efficiency funds on advertising, or like items, rather than focus on the statutory goals of reducing energy consumption. If, for example, a ComEd spent the amount of money it seeks to spend on advertising, thereby increasing enrollment in "Nature First," and then in a future year, customers "dropped out" of the program because ComEd actually used it, it could then seek to expend more money on

advertising to replace the customers that "dropped out" due to use of the program. In so doing, it could use the order in this docket as a basis for this request. More importantly, in such a situation, its focus would be on increasing customer participation, with minimal use of the program, instead of designing a program that actively reduces energy consumption. The Post-Exceptions Order, therefore, does not contain ComEd's recommended changes.

**Access to Usage Information for Commercial Customers**

In the ComEd docket, the City of Chicago and BOMA urged this Commission to require ComEd to provide, at no cost, a type of meter/data infrastructure information to commercial customers. Both the City and BOMA are participating in a program with Energy Star to increase the energy efficiency of buildings in Chicago. (*See, e.g.,* the City of Chicago's Brief on Exceptions at 6-7; BOMA Brief on Exceptions at 8-9). They contend that, to ensure that this program is successful, participating building owners need access to their energy usage information. However, according to the City of Chicago, the price ComEd charges for this information is "steep." (*See,* the City of Chicago's Brief on Exceptions at 7). ComEd has indicated that it will provide this information, for free, but it will only do so to participants in its "Business Solutions" program, one of the commercial energy efficiency programs it will begin to offer pursuant to docket 07-0540.

The ALJPO in the ComEd docket encouraged ComEd to provide whatever information it has to BOMA members, and to consider developing methodologies that will aid BOMA and other large commercial consumers with regard to their electric usage decisions. However, it declined to order ComEd to provide entities that are not program participants with free information or meters or like items, as no reason was given to require all of ComEd's customers to pay for information that would be useful to only a few customers. Moreover, as a practical matter, no information was provided as to how much it would cost to provide all of this information for free, or, what exactly providing this information would entail.

On Exceptions, BOMA and the City of Chicago urge this Commission to reconsider this finding, stating that this information is critical to their participation in the Energy Star program. However, no reason was articulated as to why BOMA's members, or, the City of Chicago, were unable to simply enroll in ComEd's Business Solutions program, thereby entitling them to this information for free. The Post-Exceptions Proposed Order, therefore, did not include the changes proposed by BOMA and the City of Chicago.

**"Leveraging" Existing Energy Efficiency Programs**

At trial in the ComEd docket, the City of Chicago presented evidence establishing that it had several energy efficiency programs. It contended that this Commission should establish a preference for "leveraging" existing energy efficiency programs, meaning that ComEd would pool resources with those programs, which allows ComEd's

expenditures on energy efficiency to be more efficiently used or spent. The ALJPO in the ComEd docket established a preference for the use of any existing energy efficiency program, including, but not limited to, those provided by Chicago, providing that funds were used in such a manner that did not prove to be disadvantageous to those persons or entities outside Chicago's city limits. The ALJPO, however, did not require ComEd to "leverage" any program. It noted that Mr. Brandt, a ComEd witness, testified that he was willing to evaluate any "potential synergies" between existing programs and ComEd programs. (ComEd Ex. 1.0 at 11). It directed ComEd to explore this topic with its advisory committee.

ComEd does not object to the direction to explore this topic with its advisory committee. Rather, it takes exception to the fact that the ALJPO concluded that Mr. Brandt's statement expressed willingness to adopt the City of Chicago's proposal. (*See,* ComEd Brief on Exceptions at 46-47).

It is difficult to fathom what ComEd's objection is. The only requirement of ComEd in the ALJPO was to "explore" this topic with its advisory committee, and ComEd did not object to this language. Moreover, according to ComEd, Mr. Brandt stated that ComEd "will evaluate any potential synergies between existing programs . . . and our proposed programs to increase the participation and cost-effectiveness of the ComEd portfolio." (*See,* ComEd Brief on Exceptions at 46). This testimony expresses a willingness to evaluate other, existing energy efficiency programs for purposes of combining resources. Therefore, the suggested language in ComEd's Brief on Exceptions was not included in the Post-Exceptions Proposed Order.

Accordingly, we recommend that the Commission enter the attached Post-Exceptions Orders in dockets 07-0539 and 07-0540.

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